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IN THE

Supreme Court of the United States

October Term, 1967
No. 1023

SOUTHERN CONSTRUCTION COMPANY, INC., *et al.*,
Petitioners,

vs.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION.

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Respondent, General Electric Company, respectfully submits the following in opposition to the Petition for Certiorari to the Court of Appeals for the Fifth Circuit:

Opinions Below.

Petitioners made correct references to the opinions below.

Jurisdiction.

Petitioners correctly stated the grounds of jurisdiction.

Question Presented.

Petitioners misstated the question presented by their application. Speaking in the language of Petitioners

and the statute involved, the suit below sought to recover the "amount, or the balance thereof, unpaid at the time of institution" of suit for "the very same 'material' first mentioned" and was commenced prior to the expiration of one year after the day on which Respondent last supplied material and prior to the expiration of one year after the day on which Respondent last supplied "the very same 'material' first mentioned in unchanged Subpart (a), viz., that 'for which such claim is made' ".

The question presented is, shall the statute involved be interpreted according to its clear meaning, or if not, shall it be interpreted so as to allow obligors upon Miller Act bonds to manipulate the duration of the limitation periods for notice and suit?

Statute Involved.

Petitioners correctly quoted the statute involved.

Statement of the Case.

Petitioners stated the case incompletely. The following facts were omitted:

(a) Respondent gave Petitioners the statutory notice required by Subpart(a) in which it properly claimed payment for the so-called terminal materials supplied on March 30, 1960. At the time of the notice Respondent was unpaid for such materials.

(b) The two ninety-day "suit-related limitation periods" prescribed by Subpart(a) in fact commenced to run on March 30, 1960.

(c) Whether the interpretation of Subpart(b) urged by Petitioners or that adopted by the Fifth

Circuit be followed, the one year "suit-related limitation period" prescribed by Subpart(b) did in fact commence to run on March 30, 1960. (See Summary of Facts in Opinion of Fifth Circuit)

Petitioners inaccurately stated the case at page 5 of their Petition. Correctly stated, the last paragraph printed on said page 5 would read:

> Almost ten months after Evans paid Respondent for the transferred terminal materials originally furnished on Mojave's account, Respondent sued Petitioners on the bond, under the Miller Act, for the unpaid purchase price of materials claimed in the statutory notice previously given pursuant to Subpart(a) of §270b. That suit was filed in the lower court on March 13, 1961, within one year after Respondent furnished the last of the materials for which claim was originally made in the said statutory notice and for which claim was then, inadvertently, being asserted in the suit, within one year from Respondent's supply of the terminal material Evans paid for long before suit, but more than one year after Respondent furnished the last of the materials for which it was then in fact unpaid. (See Summary of Facts in Opinion of Fifth Circuit)

ARGUMENT.

Petitioners' argument proceeds upon the theory that the Court should not be slave to the plain, unambiguous language of Subpart(b) of §270b. (page 8 of Petition.) They claim the statute should be construed in the light of Congressional history and *in pari materia* with Subpart(a). As the Fifth Circuit points out, conceding the argument avails Petitioners nothing. The legislative history of the statute involved and the doctirne of *pari materia* properly applied support rather than contradict the plain meaning of the language adopted by the Congress. (Footnote 4, page 16 of Petition) However, in refusing to resort to legislative history or the rule of *pari materia*, the Fifth Circuit correctly applied well established rules of law to the facts of this case and the statute involved. The holding of the Fifth Circuit is entirely consistent with the remedial purposes of the Miller Act rejecting, as it does, an interpretation which would allow prime contractors or bonding companies to manipulate the one year limitation period to the detriment of those intended to be protected by the Act. (Footnote 5, page 16 of Petition.) Certiorari is not required under such circumstances.

Petitioners would have us infer from their argument that certiorari is necessary to eliminate conflicts between the decisions of lower courts. (pages 6, 7 of Petition.) Such is not true. There is no conflict among the decisions of the lower courts on the point involved in these proceedings. Petitioners point to the holding of two District Courts (The District Court below and United States for use of *McGrath v. Travelers Indemnity Co.*, 253 F. Supp. 330 (D.C., Ariz.—(1966).) In view of the fact that the only two District

Court opinions involved are the one below and another which relied entirely on the published opinions of the court below, that error has already been corrected by the opinion of the Fifth Circuit in this cause. Petitioners also repeat a passing comment from the opinion of the Ninth Circuit in *United States for use of Austin v. Western Electric Co.*, 337 F. 2d 568 (C.A. 9-1964). The point now under consideration was not involved in the matter before the Ninth Circuit and was not the subject of either the reasoning or the holding of the Court. Simply, in light of the facts before it, the Court's observation was a truth stated in passing. There is no conflict of thought or holding between the Ninth Circuit in *Austin* and the Fifth Circuit in this cause.

A proper application of the Petitioners' quotation from *Austin* to the facts of this case demonstrates, in any event, the futility of Petitioners' argument. Petitioners quoted as follows:

> "'[A] subcontractor is required [by part (a)] to give *notice* of his claim within 90 days from the date on which he performed the last labor or furnished or supplied the last material *for which claim is made.* He must [under part (b)] file *suit* within one year from *the same date.*'"

Assuming *arguendo* that the foregoing quotation is the correct rule to be applied to the facts of this case, there remains unanswered a central issue, *i.e.*, when should the date referred to in the rule be determined, prospectively or retroactively.

One possible time for determination is the time the trouble arises. At that time a materialman can determine the nature and scope of his claim, identify the

materials for which claim is to be made, and ascertain the date on which he supplied the last of such material. He then is on notice as to the date before which he must give notice of claim (Subpart(a)) and the date before which he must sue if his notice goes for naught. (Subpart(b)) In other words, the date can be ascertained at the time of default, establishing prospectively the dates before which certain acts must occur. Another possibility is the one contended for by Petitioners. That is, the time of suit or, perhaps, even more accurately the time of trial. At that time a materialman can determine which portion of his original claim has been paid by the reluctant prime contractor or bonding company, if any, and ascertain in retrospect when he should have given his notice and when he should have commenced suit.

Respondent respectfully suggests that Petitioners "same date" argument does not further their cause. To succeed, Petiioners must convince this Court that Congress intended that all three "suit-related limitation periods" be fixed in retrospect based upon the claims successfully established at trial, not prospectively at the time of the default or claim made.

The real burden of the Petitioners' argument becomes even more graphic when it is realized that the only reason Respondent is before this Court is that it adopted a "same date" course of its own. When Mojave defaulted, Respondent prepared its claim, gave statutory notice, ascertained the date upon which it supplied the last materials for which such claim had been made (March 30, 1960). It then waited for payment properly due it from Petitioners and when payment was not forthcoming, commenced suit before the

expiration of one year from the date it supplied the last materials for which such claim had been made. Respondent finds it confusing to hear argument that its just claim ought to be forfeited because Respondent did just exactly what Petitioners assert should have been done. Respondent acted as it did at the time of the Mojave's default on March 15, 1960. Petitioners claim Respondent should have acted on May 31, 1960, retroactively, after partial payment on account in response to the statutory notice of claim given two and one-half months earlier. (or perhaps the claim is Respondent must discover at trial that it should have acted on May 31, 1960) No such requirement of hindsight can be read into Subpart(b) of §270b.

The last point argued by Petitioners claims potential hardship to small prime contractors. (pages 8, 9 of Petition.) The claimed hardship is predicted to arise out of an extension to an indefinite future date of time to assert claims under the Miller Act. The point is without merit. *United States for the use of Austin v. Western Electric Co.*, 337 F. 2d 568 (C.A. 9-1964) quoted from by Petitioners in connection with another point, supplies the answer to Petitioners' concern. There the Court was dealing with the question of the type of conduct which extends coverage of the Miller Act. To this point the Court says:

> ". . . the test to be applied is whether . . . the material (was) supplied as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project'."

The Court reasoned that the supplying of material in connection with the first of the two alternatives extends

all suit-related limitation periods and the supplying of materials in connection with the second alternative extends none. The test discussed by the Ninth Circuit in *Austin* is well established and the opinion of the Fifth Circuit in this cause will not even remotely suggest the problem discussed by Petitioners when read in accord with existing law.

Conclusion.

The statute involved, in connection with the point involved, is clear and unambiguous and completely and accurately reflects the Congressional intent. The statute was properly interpreted and applied to the facts of this case by the Fifth Circuit in a well written, easily understood opinion which will afford the Bench and Bar a sound precedent for the future. Respondent respectfully urges that certiorari be denied.

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